1953

Elwood Bowman v. Norman D. Hayward et al : Brief of Appellant

Utah Supreme Court

Moss & Hyde; Attorneys for Appellants;

7918

Case No. 7918

IN THE SUPREME COURT of the STATE OF UTAH

ELWOOD BOWMAN,
Plaintiff and Respondent,

vs.

[NORMAN D. HAYWARD], HARTFORD ACCIDENT & INDEMNITY COMPANY, GEORGE BECKSTEAD, and UNITED STATES FIDELITY AND GUARANTEE COMPANY,
Defendants and Appellants.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

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APPELLANT'S BRIEF

STATEMENT OF FACTS

This is an appeal by defendants Hartford Accident & Indemnity Company, George Beckstead, and United States Fidelity and Guarantee Company from the lower Court's Order awarding a "reasonable attorney's fee" in the amount of $25 to defendant Beckstead and refusing to award any attorney's fee to defendants Hartford Accident & Indemnity Company and United States Fidelity and Guarantee Company. Norman Hayward, defendant below, does not appeal and is not a party here.

Plaintiff filed a joint and several action in the District Court to recover damages in the amount of $10,000 and attorney's fees against four separate defendants for an alleged assault and battery (Tr. 1, 2). Defendant Hayward was a deputy sheriff of Salt Lake County at the time of the alleged incident. Defendant Hartford Accident & Indemnity Company had issued a Surety Bond running to George Beckstead, Sheriff, and conditioned upon the faithful performance of the office of Deputy Sheriff by defendant Hayward (Tr. 224). Defendant Beckstead was Sheriff of Salt Lake County. Defendant United States Fidelity and Guarantee Company had issued a Surety Bond running to Salt Lake County and conditioned upon faithful performance of the office of Sheriff by defendant Beckstead (Tr. 224). All four defendants answered. Each denied liability and prayed for a dismissal of the action and for their costs and for attorney's fees of $1,000.00 pursuant to Section 104-44-22 U.C.A. 1943.

The case was tried to a jury which rendered its verdict against defendant Hayward in his personal capacity and not as a deputy sheriff and assessed damages of $150.00 against Hayward (Tr. 195-A). No verdict was found against defendants Hartford, Beckstead, and U.S.F.&G. who were exonerated (Tr. 195-C).

Thereupon defendants Hartford, Beckstead, and U.S.F.&G. each for himself petitioned the Court for Judgment on the Verdict for attorney's fees as prayed in their answer and as provided by Sec. 104-44-22, U.C.A.

1943. The Court awarded attorney's fees to defendant Beckstead in the amount of $25 and refused to award any attorney's fees to defendants Hartford and U.S.F.&G. (Tr. 202). Thereafter testimony was taken by the Court regarding the legal services rendered to said defendants by their counsel in defending the action (Tr. 7, 8, 9), but no modification, recision or other change was made in the Court's Order.

(NOTE: Although the record is silent on the award of $25 as reasonable attorney's fee to defendant Beckstead, such order was made in open Court).

STATEMENT OF POINTS

I.

THE COURT ABUSED ITS DISCRETION AND ACTED ARBITRARILY AND CAPRICIOUSLY IN AWARDING TO DEFENDANT GEORGE BECKSTEAD AS A REASONABLE ATTORNEY'S FEE THE SUM OF $25.

II.

HARTFORD ACCIDENT & INDEMNITY COMPANY WAS BY LAW ENTITLED TO AN ATTORNEY'S FEE FOR DEFENDING THE ACTION.

III.

UNITED STATES FIDELITY AND GUARANTEE COMPANY WAS BY LAW ENTITLED TO AN ATTORNEY'S FEE FOR DEFENDING THE ACTION.

ARGUMENT

Point number II and Point number III will not be argued separately. Each involves the identical point of law and will be discussed together under Point II.

I.

THE COURT ABUSED ITS DISCRETION AND ACTED ARBITRARILY AND CAPRICIOUSLY IN AWARDING TO DEFENDANT GEORGE BECKSTEAD AS A REASONABLE ATTORNEY'S FEE THE SUM OF $25.

What is a "reasonable attorney's fee"? Obviously, the term is relative and must vary from time to time and for place to place. Moreover, the term is not precise and within its scope many different fees could be set without violating the qualifying adjective "reasonable." However, we are not entirely without standards to apply and the Court below in refusing to apply any of these standards acted arbitrarily and capriciously. The case of *Thatcher* v. *Industrial Commission,* 115 Utah 568, 207 P. (2d) 178 has to do with reasonableness of an attorney's fee as fixed by the Industrial Commission. In that case counsel petitioned for a re-hearing on an unfavorable decision of the Industrial Commission. When re-hearing was denied, certiorari was granted by the Supreme Court and upon hearing there the decision of the Commission was set aside. Then the Commission awarded benefits of $7,250 to the widow of deceased and ordered that $375 be paid to counsel for the widow as compensation for their services, although counsel

and their client had agreed upon a contingent fee of $1,000. This award of counsel fees was then brought before the Supreme Court on certiorari. Other questions dealing with constitutionality were raised in the Supreme Court but the question of the amount of a reasonable attorney's fee was also raised and the Court discussed at length the factors to be considered in fixing a reasonable attorney's fee:

> "In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and for the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.
>
> "In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer

> would permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee." *Thatcher* v. *Industrial Commission, supra.*

In the case at bar, counsel were precluded from testifying as to any contract with their clients as to amount of the agreed attorney's fee, although an effort was made so to do. Moreover, the record does not disclose that the agreed fee was contingent upon success. Counsel were prepared to show both facts. After the Court's judgment on damages was entered, defendants petitioned for judgment on the verdict for attorney's fees in accordance with Section 104-44-22 U.C.A. 1943. This petition was made separately by defendants Beckstead (Tr. 196), Hartford (Tr. 197), and U.S.F.&G. (Tr. 198). The Court denied the petitions of Hartford and U.S.F.&G. for attorney's fees (Tr. 202). Upon request of counsel for said defendants some testimony was heard but the Court never rescinded, modified or re-affirmed his Order (Tr. 10). Thereafter, counsel moved the court to reconsider the motion to fix attorney's fees and to hear additional evidence (Tr. 199, 200, 201). Pursuant to notice, counsel for both sides appeared before the Court prepared to present evidence but the Court summarily refused to hear further evidence and denied the motions (Tr. 204). It is submitted that the Court acted arbitrarily and capriciously in refusing to hear evidence upon which to base his ruling as to reasonable attorney's fees. Further, it is submitted that the Court failed to consider the proper factors in setting the amount of the

attorney's fee as is apparent from the award of $25 to defendant Beckstead and nothing to defendants Hartford and U.S.F.&G. If an attorney's fee of $375 was unreasonably low in the *Thatcher* case and if $1,000 was "within the range between the highest and lowest reasonableness" it is clear beyond question that $25 for defendant Beckstead is unreasonably low in this case and that no attorney's fee at all for defendants Hartford and U.S.F.&G. is unreasonable, arbitrary and capricious.

Counsel for defendants have been unable to find a Utah case squarely in point on the amount of a reasonable attorney's fee under Section 104-44-22. However, at approximately the same time that this case was heard by one Judge of the District Court, these counsel were engaged in defending a similar action against this same Sheriff and his bonding company before another Judge of the District Court. (*Herrara* v. *United States Fidelity and Guarantee Co. et al.* Case No. 96489 in the District Court in and for Salt Lake County, State of Utah). In the latter case counsel prepared and filed an answer and took the deposition of plaintiff. Shortly thereafter plaintiff moved to dismiss his action which motion was granted by the Court. Counsel for defendants then moved the Court to fix a reasonable attorney's fee under Section 104-44-22. After hearing testimony and argument the Court set $200 as a reasonable attorney's fee, which amount was paid from the cash undertaking posted by plaintiff at the commencement of the action. It is not contended here that this amount is in any way bind-

ing on another Judge of the same Court nor upon this Court, but it is recited here by way of contrast. In the *Herrara* case the matter never even reached the trial stage; while in the present case counsel conducted a two day jury trial and achieved an exoneration of their clients from liability in a law suit for $10,000 and attorney's fees.

Counsel for defendants are both members in good standing of the Utah State Bar. They maintain law offices in Salt Lake City and engage in the general practice of law in Utah and elsewhere. Both are members of the Salt Lake County Bar. Like every practicing lawyer everywhere, their time, training and skill are their stock in trade for which they are entitled to reasonable compensation to pay the rent, the stenographer, the telephone and all the other overhead of a law office, as well as to pay the grocery bills and rent at home. In this case the record shows that counsel expended from their "stock in trade" time and training and skill to:

1. File an answer for each defendant.

2. File a motion to dismiss as to Hartford and U.S.F.&G.

3. Appear in Court and argue the motions to dismiss.

4. Take the deposition of plaintiff Bowman.

5. Appear and participate in the taking of the deposition of defendant Hayward and witness Treseder.

6. Interview all prospective witnesses.

7. Examine the location of the alleged incident.

8. File a motion challenging the undertaking filed by plaintiff.

9. Appear in court to argue said motion.

10. Represent defendants (successfully) during two days of jury trial.

11. File motions for judgment on the verdict.

12. Appear in court and argue said motions.

It seems patent from this list of activities that any reasonable person, whether an attorney or not, must conclude that $25.00 is not a "reasonable" amount to compensate a firm of attorneys in Salt Lake City, Utah, A.D. 1952 for services performed in successfully defending their clients in a $10,000 law suit.

The Court's attention is directed to a suggested minimum fee schedule published in the *Utah Bar Bulletin,* Vol. XXII, Nos. 1-3, January-March 1952, at page 13 et seq. Paragraph XI of said schedule indicates that the minimum fee per day in district court varies from $50 per day to $250 per day. The minimum fee for a default divorce is $150 (Par. XII) and an appearance before an administrative commission ranges from $50 to $250 (XX). It is not suggested that said *minimum* fees are binding or controlling on the District Judge in setting a "reasonable attorney's fee" but certainly this schedule furnishes a standard in this County and State. See: *Thatcher* v. *Industrial Commission, supra.*

II.

HARTFORD ACCIDENT & INDEMNITY COMPANY WAS BY LAW ENTITLED TO AN ATTORNEY'S FEE FOR DEFENDING THE ACTION.

III.

UNITED STATES FIDELITY AND GUARANTEE COMPANY WAS BY LAW ENTITLED TO AN ATTORNEY'S FEE FOR DEFENDING THE ACTION.

Plaintiff brought his action against each of four defendants—jointly and severally. He devoted a separate paragraph to each one and alleged liability in each. And against each one he sought damages of $10,000.00 and "a reasonable attorney's fee." Summons was served on each defendant and each was compelled to answer or to suffer an adverse judgment by default. Each of the four defendants separately retained counsel to defend the action. In their answer the four defendants each prayed for dismissal of the action, for their costs, and for "$1,000 attorney's fee in accordance with Section 104-44-22, Utah Code Annotated 1943" which fee was less than 10% of the amount for which each defendant was being sued.

Section 104-44-22, U.C.A. 1943 reads:

> "In any action brought against any sheriff, constable, peace officer, state road officer, or any other person charged with the duty of enforcement of the criminal laws of this state, or service of civil process, when any such action arises out of, or in the course of, the performance of his

duty, or in any action upon the bond of any such officer, the prevailing party therein shall, in addition to an award of costs as otherwise provided by law, recover from the losing party therein such sum as counsel fees as shall be allowed by the court. The official bond of any such officer shall be liable for any such costs and attorney's fees. Before any such action if filed, and as a condition precedent thereto, the proposed plaintiff shall prepare and file with, and at the time of filing, the complaint in any such action, a written undertaking with at least two sufficient sureties in an amount to be fixed by the court, conditioned upon the diligent prosecution of such action, and, in the event judgment in the said cause shall be against the plaintiff, for the payment to the defendant of all costs and expenses that may be awarded against such plaintiff, including a reasonable attorney's fee to be fixed by the court."

It will be noted:

(1) That in any action upon the bond of any sheriff or peace officer the prevailing party "shall * * * recover from the losing party therein * * * counsel fees * * *."

(2) That any plaintiff filing suit against a sheriff or peace officer must furnish a written undertaking "and, in the event judgment in the said cause shall be against the plaintiff [said undertaking shall stand] for the payment to the defendant of all costs and expenses that may be awarded against such plaintiff, including a reasonable attorney's fee to be fixed by the court."

Surely it cannot be denied that this is an action "upon the bond" of the sheriff and of his deputy sheriff.

Nor can it be denied that Hartford and U.S.F.&G. were "prevailing parties." Therefore, plaintiff Bowman was the "losing party" as against these defendant-appellants. Therefore, pursuant to Section 104-44-22, the plaintiff must pay to defendants "all costs and expenses * * * including a reasonable attorney's fee * * *."

It does not seem necessary to argue that no fee at all is not a "reasonable attorney's fee."

Suppose, for argument, that the verdict had been for plaintiff and against all defendants, would not each defendant have been liable severally not only for damages assessed, but for counsel fees as well? Plaintiff prayed for attorney's fees against each defendant under the statutory authority of Section 104-44-22. Had the verdict been for him he would have recovered also his attorney's fees. Therefore, by the authority of the same statute, since the verdict was against plaintiff and in favor of Hartford and U.S.F.&G., plaintiff must pay to these defendants "a reasonable attorney's fee." Each defendant was compelled to retain counsel to defend the action filed against him. By law, each, having prevailed in the action, is entitled to recover from plaintiff his expenses including a reasonable attorney's fee.

CONCLUSION

The Order of the trial court fixing attorney's fees for appellants should be reversed and set aside as arbitrary and capricious and the cause should be remanded

with directions to hear evidence and thereafter fix a reasonable attorney's fee for each appellant. Defendants-appellants should be awarded costs of this appeal.

Respectfully submitted,

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